

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS**

**FILED**

FEB 21 2019

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WESTERN DISTRICT OF TEXAS  
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UNITED STATES OF AMERICA )

v. )

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ERNESTO GUTIERREZ-MARTINEZ, )  
Defendant. )

Criminal Case No. 5:18-722

**ORDER**

The Fourth Amendment permits the police to seize a suspect's cellphone incident to their arrest while seeking a warrant to search it. *Riley v. California*, 573 U.S. 373, 388 (2014) (citing *Illinois v. McArthur*, 531 U.S. 326, 331-33 (2001); *United States v. Chadwick*, 433 U.S. 1, 13 (1977)). But the police must have had probable cause to believe the suspect was committing a crime to effectuate the arrest in the first place. *United States v. Robinson*, 414 U.S. 218, 235 (1973).

Here, the police clearly had a reasonable suspicion that defendant Ernesto Gutierrez-Martinez was dealing firearms without a license in violation of 18 U.S.C. § 922(a)(1)(A): He advertised for over a year on a public firearms website offering to pay cash for 0.50-caliber rifles, 0.38-caliber pistols, AK-47-type rifles, AR-15-type rifles, 9mm pistols, and 0.57-caliber pistols. Gov't Ex. A, Aff. Supp. Appl. Search Warrant at ¶¶ 9-11. In this region of the United States, criminals routinely buy those particular weapons through legal domestic channels, smuggle them across the southern border, and sell them to Mexican drug cartels. *Id.* ¶¶ 11, 33-34. Indeed, Gutierrez-Martinez had attracted the government's attention in a prior firearm-trafficking investigation. *Id.* ¶ 15. And importantly, he was not a licensed firearm dealer. *Id.* ¶ 13. Yet when a government informant offered to sell him 0.50-caliber rifles (each worth between

\$8500 and \$12,000), Gutierrez-Martinez committed to buy one for his personal use, one for a friend, and eventually asked to purchase a third for unknown purposes. *Id.* ¶¶ 17–18, 20, 24, 32. He requested a picture of one of the rifles to show the friend, subsequently indicating the friend’s approval and promising to purchase the gun on their behalf. *Id.* ¶¶ 29–30. He agreed to buy a rifle he knew had been previously earmarked for a Mexican cartel, and further agreed to buy rifles the informant offered to obtain through illegal straw purchases at an upcoming gun show. *Id.* ¶¶ 19, 26–27. And though he declined the informant’s offer to obliterate the rifles’ serial numbers, he made sure there would be no paperwork connecting him to the guns. *Id.* ¶¶ 22, 31. He repeatedly asked the informant for updates on the weapons, saying he wanted them as soon as possible. *Id.* ¶¶ 27–28. Once the informant told Gutierrez-Martinez two guns arrived, Gutierrez-Martinez arranged to buy them in a sporting-goods-store parking lot the next day. *Id.* ¶¶ 30, 35. But since he had a small car, he told the informant he could only take one gun at a time. *Id.* ¶ 35.

That reasonable suspicion certainly permitted the police to briefly detain Gutierrez-Martinez in the parking lot for investigative purposes and to frisk his person under *Terry v. Ohio*, 392 U.S. 1 (1968). But the police went further: After Gutierrez-Martinez gave the informant a cash-filled briefcase for the first gun, the police handcuffed him, drove him to the local ATF field office, read him his *Miranda* rights, and questioned him about buying the rifles and about the friend he promised to buy one for. *Id.* ¶ 37–41. A subsequent inventory search of his vehicle uncovered an iPhone. *Id.* ¶¶ 42–43. The police released Gutierrez-Martinez but kept the phone, holding it while seeking a search warrant, which they obtained a week later. Based in part on evidence found on the phone, the grand jury indicted Gutierrez-Martinez for conspiring to smuggle goods (violating 18 U.S.C. § 554), and to possess a firearm while trafficking drugs (violating 18 U.S.C. § 924(o)).

Yet since police seized the phone incident to his de facto arrest, the question is whether the government had probable cause. Gutierrez-Martinez says no, moving to suppress any evidence obtained from the search. The government says yes, arguing Gutierrez-Martinez's promise to buy a 0.50-caliber rifle for his friend gave rise to probable cause that he was dealing in firearms without a license.

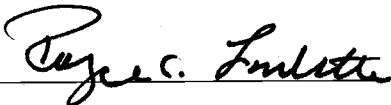
"[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). Instead, it involves this Court's "practical, common-sense" judgment on whether a reasonable person could have perceived "a fair probability that contraband or evidence of a crime w[ould] be found." *Id.* at 238. Put differently, police need not be "[c]ertain[] that a crime was being committed": a fair probability of finding incriminating evidence can arise once police observe multiple individually licit circumstances if their confluence rarely accompanies lawful conduct. *See, e.g., United States v. Resnick*, 455 F.2d 1127, 1132 (5th Cir. 1972).

So too here. As the government's witnesses testified at the detention and suppression hearings, there is nothing inherently suspect about buying a 0.50-caliber rifle, or even about using cash to buy it, since sellers often insist on cash to avoid bounced checks. 2/20/19 Draft Tr. 22:6–23:1 (on file with the Court); 12/11/18 Tr. 19:24–20:9, ECF No. 23. Nor can the government say if Gutierrez-Martinez purchased other guns through his online advertisements. 2/20/19 Draft Tr. 25:15–26:12. But especially given how often these particular guns are bootlegged to Mexico, the confluence of Gutierrez-Martinez's awareness that an offered gun had previously been tendered to a cartel, his willingness to buy guns obtained through illegal straw purchasers, and his acknowledgment that he was buying a gun for a friend sufficiently suggested

he was dealing firearms without a license. In particular, under these facts, a reasonable person could perceive a fair probability of finding relevant incriminating evidence on his iPhone. So the Court holds the police had probable cause to arrest Gutierrez-Martinez and to seize his phone.

The Court **DENIES** Gutierrez-Martinez's motion [26] to suppress.

Date: February 4, 2019

A handwritten signature in black ink, reading "Royce C. Lamberth", written over a horizontal line.

Royce C. Lamberth  
United States District Judge